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ASSUMPTION OF RISK IN MONTANA: AN ANALYSIS OF THE SUPREME COURT'S TREATMENT OF THE DOCTRINE

Laura D. Hayes*

*What are maxims but the expression of that
which good sense has made a rule?*
—Lord Bramwell¹

I. INTRODUCTION

The Montana Supreme Court has inconsistently interpreted and applied the doctrine of assumption of risk since its adoption² in the late 19th century. In 1978, the court candidly recognized the confusion surrounding the rule,³ and attempted to define assumption of risk once and for all. This effort, however, was reassessed when comparative negligence cases began emerging. Again, questions arose regarding the definition and application of assumption of risk. Left with the choice of whether to reexamine assumption of risk or to abolish the doctrine outright, the Montana Supreme Court chose the former. The court harmonized assumption of risk with comparative negligence and successfully preserved assumption of risk . . . or did it? This comment examines the history, modern definition, and development of assumption of risk in Montana. The overview briefly delves into the earliest English cases discussing assumption of risk and examines the adoption of the doctrine in Montana. Next, the comment explores Montana case law and the means the Montana Supreme Court has chosen to incorporate comparative negligence and assumption of risk. This comment also addresses the inconsistencies that have resulted from this effort, and concludes by proposing several solutions to these inconsistencies.

II. DEVELOPMENT OF THE ASSUMPTION OF RISK DEFENSE

A. *The Historic Meaning of Assumption of Risk*

The earliest scholars interpreted assumption of risk to mean

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1. *Smith v. Charles Baker and Sons*, 60 L.J.Q.B. 683, 698 (A.C. 1891).

2. *See Goodwell v. Montana Cent. Ry. Co.*, 18 Mont. 293, 298, 45 P. 210, 212 (1896).

3. *Brown v. North Am. Mfg. Co.*, 176 Mont. 98, 111, 576 P.2d 711, 719 (1978).

that "[o]ne who knows of a danger arising from the act or omission of another, . . . understands the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure."⁴ Assumption of risk is different than contributory negligence.⁵ "[C]ontributory negligence involves inadvertence or unintentional failure to measure up to a proper standard of self-protection, while assumption of risk involves the conscious and deliberate decision to encounter a known risk."⁶ Both doctrines, however, may exist simultaneously.⁷

Assumption of risk "is founded on the principle . . . that he who consents to an act will not be heard to claim that he is wronged by it."⁸ If the plaintiff's conduct in assuming the risk is voluntary and reasonable, the doctrine negates the duty of care the defendant otherwise owes the plaintiff.⁹ If the defendant owes no duty to the plaintiff, it follows that the plaintiff has no right of action against the defendant.¹⁰ Therefore, the duty owed a plaintiff in each particular case must be closely analyzed.¹¹

4. Charles Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 HARV. L. REV. 457, 459 (1895) [hereinafter *Warren*].

5. The Restatement sets out that the plaintiff's contributory negligence can amount to either:

(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or (b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm.

Restatement (Second) of Torts § 466 (1965).

6. John W. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 11 (1961) [hereinafter *Wade*].

7. *Hanson v. Colgrove*, 152 Mont. 161, 447 P.2d 486 (1968); *Cassady v. City of Billings*, 135 Mont. 390, 340 P.2d 509 (1959). When a plaintiff voluntarily and unreasonably consents to encounter a danger, implied assumption of risk and contributory negligence overlap. *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1240 (Cal. 1975); RESTATEMENT (SECOND) OF TORTS § 496A cmt. d (1965). Support for combining the two defenses when such overlapping occurs has increased over the last few decades. See James Fleming, Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 186-88 (1968) [hereinafter *Fleming*]. Most authorities, however, treat the defenses separately. See, e.g., RESTATEMENT (SECOND) OF TORTS § 496A (1965); HARPER AND JAMES, TORTS §§ 21.0 to .8 (1986); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68 at 480-98 (5th ed. 1984) [hereinafter *KEETON et al.*].

8. Carl Roehl, Note, *Assumption of Risk: Application of the Doctrine in Montana*, 30 MONT. L. REV. 71 (1968) [hereinafter *Note, Assumption of Risk*].

9. Mae Nan Ellingson, Comment, *Comparative Negligence in Montana*, 37 MONT. L. REV. 152, 159 (1976) [hereinafter *Comment, Comparative Negligence*].

10. *Warren*, *supra* note 4, at 458. This is true only if assumption of risk is considered a bar to a right of action rather than a defense. Assumption of risk becomes a defense when there is a duty but causation is contested. *Id.* See also KEETON et al., *supra* note 7, at 481.

11. Leon Green, *Assumed Risk as a Defense*, 22 LA. L. REV. 77, 88 (1961) [hereinafter *Green*].

B. Assumption of Risk Originates in England: 1799-1837

The above concepts were first implicitly introduced in English common law in 1799.¹² In *Cruden v. Fentham*, the defendant drove his carriage on the wrong side of the road and ran into the plaintiff's horse when the plaintiff attempted to pass.¹³ The judge advised the jury that, because the road was wide enough for both parties, the plaintiff placed himself "voluntarily into the way of danger, and the injury was of his own seeking."¹⁴

Not until *Ilott v. Wilkes*,¹⁵ however, did the English courts explicitly treat assumption of risk as a recognized doctrine, denoting it by the Latin *volenti non fit injuria*.¹⁶ *Ilott* involved a trespasser who proceeded upon private property after disregarding posted warning signs.¹⁷ The trespasser was injured when he inadvertently tripped over a hidden wire that set off a loaded spring-gun.¹⁸ The court found for the defendant property owner, holding that the trespasser could not recover for the results of his own wrongs because he knew of the immediate risks involved before encountering them.¹⁹ According to the court, "[K]nowing that [the plaintiff] is in the hazard of meeting with the injury which the guns are calculated to produce, it seems . . . that he does it at his own peril, and must take the consequences of his own act. The maxim of law, *volenti non fit injuria*, applies."²⁰

In 1837, *volenti non fit injuria* "received its greatest impetus"²¹ in *Priestly v. Fowler*.²² This master-servant case involved an overloaded van which gave way and threw the servant-driver to the ground.²³ The court found that the servant had constructive knowledge that the van was dangerous.²⁴ Moreover, the servant "was not bound to go by an overloaded van; he consent[ed] to take

12. *Cruden v. Fentham*, 2 Esp. 685, 170 Eng. Rep. 496 (1799). This case clearly distinguished assumption of risk from contributory negligence.

13. *Id.*

14. *Id.* at 686, 170 Eng. Rep. at 496. The jury, however, found for the plaintiff. *Id.*

15. 3 Barn. & Ald. 304, 106 Eng. Rep. 674 (K.B. 1820).

16. *Volenti non fit injuria* means "that no wrong is done to one who consents." The phrase is indistinguishable from assumption of risk. RESTATEMENT (SECOND) OF TORTS § 496A cmt. b (1965).

17. *Ilott*, 3 Barn. & Ald. at 306, 106 Eng. Rep. at 675.

18. *Id.*

19. *Id.* at 313, 106 Eng. Rep. at 678.

20. *Id.* at 311, 106 Eng. Rep. at 677.

21. KEETON et al., *supra* note 7, at 480 n.1.

22. 3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837).

23. *Id.* at 1-2, 150 Eng. Rep. at 1030-31.

24. *Id.* at 3, 150 Eng. Rep. at 1031.

the risk.”²⁵ The court concluded that the master had no duty “to take more care of the servant than he may reasonably be expected to do of himself.”²⁶

These early English cases demonstrate that *volenti non fit injuria* originated as both a defense where a duty arose, and a rule of law which prevented a plaintiff from asserting an action when the plaintiff’s own misconduct caused the accident.²⁷ *Volenti non fit injuria* continued to evolve after *Priestly*. The doctrine became increasingly popular in England in the 1880’s, when it was substituted for the recently abolished “employee’s risk” defense.²⁸ Once Americans realized the advantages of the pro-employer doctrine, *volenti non fit injuria* was adopted in the United States under the name “assumption of risk.”²⁹

25. *Id.*

26. *Id.* at 6, 150 Eng. Rep. at 1032.

27. Warren, *supra* note 4, at 459.

28. *Id.* at 463. “Employee’s risk” meant that a worker automatically assumed all obvious risks on the job because it was presumed “that the servant [knew] the ordinary incidents of the business on which he engage[d] when he enter[ed] the property of the master.” *Id.* at 470.

29. Some jurisdictions have limited the application of assumption of risk to the employer-employee or similar contractual relationship. Accordingly, these jurisdictions have developed other names for the doctrine when it occurs outside these relationships. *See, e.g.*, *Antcliff v. Datzman*, 436 N.E.2d 114 (Ind. App. 1982) (“incurred risk”); *Cummins v. Halliburton Oil Well Cementing Co.*, 319 S.W.2d 379 (Tex. Ct. App. 1958) (“*volenti non fit injuria*”). In addition, several states and federal statutes have narrowed or abrogated the implied assumption of risk defense. *See, e.g.*, *Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968) (abolished applicability to driver and guest); *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226 (Cal. 1975) (abolished assumption of risk when it overlaps with contributory negligence); *Rosenau v. City of Estherville*, 199 N.W.2d 125 (Iowa 1972) (abolished the implied form); *Parker v. Redden*, 421 S.W.2d 586 (Ky. Ct. App. 1967) (abolished the implied form); *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976) (abolished the implied form); *Felgner v. Anderson*, 133 N.W.2d 136 (Mich. 1965) (abolished the implied form); *Springrose v. Willmore*, 192 N.W.2d 826 (Minn. 1971) (abolished assumption of risk when it overlaps with contributory negligence); *Braswell v. Economy Supply Co.*, 281 So.2d 669 (Miss. 1973) (abolished assumption of risk when it overlaps with contributory negligence); *Hines v. Continental Baking Co.*, 334 S.W.2d 140 (Mo. Ct. App. 1960) (abolished applicability to the employer-employee relationship); *Bolduc v. Crain*, 181 A.2d 641 (N.H. 1962) (abolished the implied form); *McGrath v. American Cyanamid Co.*, 196 A.2d 238 (N.J. 1963) (abolished the implied form); *Williamson v. Smith*, 491 P.2d 1147 (N.M. 1971) (abolished the implied form); *Zumwalt v. Lindland*, 396 P.2d 205 (Or. 1964) (abolished applicability to driver and guest); *Ritter v. Beals*, 358 P.2d 1080 (Or. 1961) (abolished applicability to the employer-employee relationship); *Lyons v. Redding Constr. Co.*, 515 P.2d 821 (Wash. 1973) (abolished assumption of risk when it overlaps with contributory negligence); *Siragusa v. Swedish Hosp.*, 373 P.2d 767 (Wash. 1962) (abolished applicability to the employer-employee relationship where the employer is negligent); *Gilson v. Drees Bros.*, 120 N.W.2d 63 (Wis. 1963) (abolished the implied form). One federal statute, the Federal Employee Liability Act (FELA), denies certain employers the right to assert assumption of risk. 45 U.S.C. § 54 (1988). Similarly, certain Montana statutes prohibit the defense. *See* MONT. CODE ANN. § 69-14-1006(2)(b) (1991) (railroad employee “shall not be deemed to have assumed any risk incident to his employment when such risk arises by reason of the negligence of his employer . . .”). *See also* *Brewer v. Ski-*

C. Adoption, Application, and Meaning of Assumption of Risk in Montana

Assumption of risk was first introduced in the United States to serve as a bar to labor suits.³⁰ It was adopted in Montana to apply to the employer-employee relationship as well.³¹ During the industrial era, it was an especially popular mechanism by which employers avoided responsibility for workers' injuries.³² The doctrine left employers practically immune from employee suits until the late 1800's, when labor legislation and worker's compensation laws were enacted.³³ Instead of fading out of use, however, assumption of risk was extended in Montana.³⁴ The doctrine was subsequently applied to actions in negligence,³⁵ products liability,³⁶ and

Lift, Inc., 234 Mont. 109, 115, 762 P.2d 226, 230 (1988) (skier responsibility statutes that required skiers to assume all risks and responsibility for ski accidents were recently struck down as a violation of skiers' equal protection rights and MONT. CODE § 27-1-701 (1987) (liability attaches to those who cause injury by lack of ordinary care)).

30. See, e.g., *Tuttle v. Detroit, Grand Haven & Milwaukee Ry.*, 122 U.S. 189 (1887).

31. *Shahrokhfar v. State Farm Mutual Auto. Ins. Co.*, 194 Mont. 76, 82, 634 P.2d 657 (1981); *Coleman v. Perry*, 28 Mont. 1, 9, 72 P. 42, 44 (1903); *Goodwell v. Montana Cent. Ry. Co.*, 18 Mont. 293, 298, 45 P. 210, 212 (1896). See also MONT. CODE ANN. § 39-2-701(2) (1991) which states that "[A]n employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed."

32. *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 58-59 (1943); James Fleming, Jr., *Assumption of Risk*, 61 YALE L.J. 141, 168-69 (1952). It is interesting to note that "pre-occupation with the doctrine . . . sometimes led courts to grant recovery to a workman who could avoid this defense (as by showing protest against the risk, or a promise to remedy it) whereas accurate analysis of the case would reveal no breach of duty by the employer." *Id.* at 169 n.149 (citing D.M. Gordon, *Wrong Turns in the Volens Cases*, 61 L.Q. REV. 140 (1945) (emphasis in original)).

33. Green, *supra* note 11, at 84.

34. In *Osterholm v. Boston & Mont. Consol. Copper & Silver Mining Co.*, 40 Mont. 508, 524, 107 P. 499, 504 (1910), the Montana Supreme Court first extended the assumption of risk doctrine to situations outside the master-servant context. The court, however, reversed this extension in *Shahrokhfar*, when it held that the doctrine's application to tortious conduct outside the employer-employee relationship should be narrowly confined. *Shahrokhfar*, 194 Mont. at 82, 634 P.2d at 657. The supreme court has since disregarded this reversal. The original *Osterholm* precedent has subsequently been recited, and thus remains good law. See, e.g., *Krueger v. General Motors Corp.*, 240 Mont. 266, 783 P.2d 1340 (1989); *Kuiper v. Goodyear Tire & Rubber Co.*, 207 Mont. 37, 673 P.2d 1208 (1983). But see *Kalanick v. Burlington N. R.R. Co.*, 242 Mont. 45, 50, 788 P.2d 901, 904 (1990) (where the court notes that "[M]ost courts have stated that assumed risk arises out of the employment contract . . .").

35. See, e.g., *Brewer*, 234 Mont. 109, 762 P.2d 226; *Thibaudeau v. Uglum*, 201 Mont. 260, 653 P.2d 855 (1982); *Abernathy v. Eline Oil Field Serv., Inc.*, 200 Mont. 205, 650 P.2d 772 (1982); *Kopischke v. First Continental Corp.*, 187 Mont. 471, 610 P.2d 668 (1980); *Casady v. City of Billings*, 135 Mont. 390, 340 P.2d 509 (1959).

36. *Krueger*, 240 Mont. 266, 783 P.2d 1340; *Kuiper*, 207 Mont. 37, 673 P.2d 1208; *Zahrte v. Sturm, Ruger & Co.*, 203 Mont. 90, 661 P.2d 17 (1983); *Brown v. North Am. Mfg. Co.*, 176 Mont. 98, 576 P.2d 711 (1978).

suits in strict liability for conducting abnormally dangerous activities.³⁷

Today, assumption of risk operates as an affirmative defense in Montana³⁸ and must be asserted in the defendant's answer or it is waived.³⁹ The burden of proof is thus placed upon the defendant.⁴⁰ The doctrine is measured by a subjective standard rather than the objective, reasonable person standard used for contributory negligence.⁴¹ The issue of assumption of risk is left to the jury in all but the clearest cases.⁴² In Montana and most other jurisdictions, assumption of risk is divided into two categories: express assumption of risk and implied assumption of risk.⁴³

1. *Express and Implied Assumption of Risk Defined*

Assumption of risk applies in four separate situations. The first situation involves express agreement, while the latter three situations involve variations of implicit consent. The express form has remained unchanged over the years, even with the recognition

37. *Matkovic v. Shell Oil Co.*, 218 Mont. 156, 707 P.2d 2 (1985).

38. MONT. R. CIV. P. 8(c). The assumption of risk doctrine arises from statute in Montana. *Wollan v. Lord*, 142 Mont. 498, 503, 385 P.2d 102, 105 (1963) (citing R.C.M. 1947, § 41-103 (1947), now MONT. CODE ANN. § 39-2-701(2) (1991)).

39. *Samuelson v. A.A. Quality Const., Inc.*, 230 Mont. 220, 224, 749 P.2d 73, 75 (1988) (citing MONT. R. CIV. P. 8(c)).

40. *Brown*, 176 Mont. at 116, 576 P.2d at 722; RESTATEMENT (SECOND) OF TORTS § 496G cmt. c (1965); *Wade*, *supra* note 6, at 11.

41. Assumption of risk is measured by a subjective standard because a plaintiff must first have knowledge of the risk in order to freely and voluntarily assume it. Note, *Assumption of Risk*, *supra* note 8, at 78. See also *Krueger*, 240 Mont. at 276, 783 P.2d at 1347 (products liability); *Zahrte*, 203 Mont. at 93, 661 P.2d at 18 (products liability); *Kuiper*, 207 Mont. at 59, 673 P.2d at 1220 (products liability); *Abernathy*, 200 Mont. at 211, 650 P.2d at 775 (negligence); *Shahrokhfar*, 194 Mont. at 82, 634 P.2d at 657-58 (negligence); *Kopischke*, 187 Mont. at 501, 610 P.2d at 684 (negligence); *Brown*, 176 Mont. at 111-12, 576 P.2d at 719 (products liability); *D'Hoodge v. McCann*, 151 Mont. 353, 363, 443 P.2d 747, 752 (1968) (negligence) (citing William L. Prosser, *Law of Torts* § 67, at 454 (3d ed. 1964)).

42. *Hanson*, 152 Mont. at 164, 447 P.2d at 488 (1968); *Clark v. Worrall*, 146 Mont. 374, 382-83, 406 P.2d 822, 826 (1965); *Wollan*, 142 Mont. at 502, 385 P.2d at 105; *Cotton v. Osterberg*, 88 Mont. 383, 390-91, 292 P. 908, 909 (1930); RESTATEMENT (SECOND) OF TORTS § 496D cmt. e (1965); *KEETON et al.*, *supra* note 7, at 494. See also *Cassady*, 135 Mont. at 392, 340 P.2d at 510 (where assumption of risk existed as a matter of law).

43. Assumption of risk has several meanings under the express and implied form. See *infra* notes 44-73 and accompanying text. Each of these meanings, however, are combined under the single name assumption of risk. This may be a source of confusion for courts attempting to interpret the doctrine. Express assumption of risk is also referred to as "contractual" or "primary" assumption of risk. See *Kopischke*, 187 Mont. at 471, 505, 610 P.2d at 668, 686. Implied assumption of risk is also referred to as "voluntary" or "secondary" assumption of risk. *Id.* at 506, 610 P.2d at 686. But see *KEETON et al.*, *supra* note 7, at 481 n.10 (refers to primary assumption of risk as the implied form of the doctrine where the plaintiff enters into a voluntary relationship with the defendant and agrees to assume risks).

of comparative fault.⁴⁴

a. *Express Assumption of Risk*

Express assumption of risk is the simplest form of the assumption of risk doctrine. It applies when the plaintiff voluntarily and expressly releases the defendant from a future duty of care.⁴⁵ The plaintiff then bears the risk of injury emanating from what the defendant previously had an affirmative duty to do or refrain from doing.⁴⁶ In its most basic sense:

[Express] assumption of risk means that the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care for his protection, and agrees to take his chances as to injury from a known or possible risk. The result is that the defendant, who would otherwise be under a duty to exercise such care, is relieved of that responsibility, and is no longer under any duty to protect the plaintiff.⁴⁷

Express assumption of risk commonly results from an exculpatory contract,⁴⁸ but may also take the form of non-contractual consent.⁴⁹ The agreement may treat exculpation broadly,⁵⁰ or limit its

44. A defendant's successful assertion of express assumption of risk will still completely bar the plaintiff's claim because assumption of risk in the express form cannot be harmonized with contributory negligence and apportioned comparatively. Robert C. Reichert, Comment, *Torts*, 42 MONT. L. REV. 425, 430 (1981) [hereinafter *Comment, Torts*]. See also KEETON et al., *supra* note 7, at 480 n.8.

45. KEETON et al., *supra* note 7, at 480.

46. *Id.* A plaintiff may agree that the defendant is not liable for the defendant's resulting negligent conduct. See, e.g., *General Ins. Co. of Am. v. Town Pump, Inc.*, 214 Mont. 27, 32, 692 P.2d 427, 430 (1984); RESTATEMENT (SECOND) OF TORTS § 496B (1965). The Montana Supreme Court held, to the contrary, that "persons may not contract against the effect of their own negligence and that agreements which attempt to do so are invalid." *Kopischke*, 187 Mont. at 485, 610 P.2d at 675; *Haynes v. County of Missoula*, 163 Mont. 270, 279, 517 P.2d 370, 376 (1973) (quoting A.M. Swarthout, Annotation, *Validity and Construction of Contract Exempting Hospital or Doctor from Liability for Negligence to Patient*, 6 A.L.R.3d 704, 705 (1966) [hereinafter *Swarthout*]). In addition, an agreement may not validly exculpate intentional torts. KEETON et al., *supra* note 7, at 489. Although the Restatement extends coverage to recklessness in RESTATEMENT (SECOND) OF TORTS § 496B (1965), Prosser disagrees. KEETON et al., *supra* note 7, at 484.

47. RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965).

48. RESTATEMENT (SECOND) OF TORTS § 496B cmt. a (1965). See, e.g., *Kopischke*, 187 Mont. 471, 610 P.2d 668. Consideration for the contract is not required. RESTATEMENT (SECOND) OF TORTS § 496B cmt. a (1965).

49. RESTATEMENT (SECOND) OF TORTS § 496B cmt. a (1965). For example, express consent includes accepting the terms of a boilerplate ski pass. See, e.g., *Brewer*, 234 Mont. 109, 762 P.2d 226.

50. A plaintiff may agree to assume all risks in a situation, regardless of whether the plaintiff is unaware of some risks. Courts are hesitant, however, to uphold such agreements unless intent (evidence that the plaintiff appreciated that some risks were undisclosed) is clearly present. RESTATEMENT (SECOND) OF TORTS § 496D cmt. a (1965).

coverage to certain specified dangers.⁵¹

The general rule is that private parties are free to contract as they see fit, and may relieve one another of duties legally owed to the other.⁵² Such agreements are normally enforceable provided they are voluntarily⁵³ entered into after "free and open bargaining."⁵⁴

The Montana Supreme Court subscribes to this general rule.⁵⁵ Even if the requirements of voluntariness and "free and open bargaining" are met, however, the court regularly invalidates exculpatory agreements for public policy reasons when a public interest is impinged upon.⁵⁶ Montana's Legislature and supreme court are particularly concerned with the unequal setting in employer-employee contracts⁵⁷ and monopolistic services.⁵⁸ A defendant assert-

51. *Id.* Specificity and mutual intent are important. A court will generally interpret a release strictly against the drafter if it finds the release couched in vague terms. RESTATEMENT (SECOND) OF TORTS § 496B cmt. d (1965); KEETON et al., *supra* note 7, at 483-84.

52. RESTATEMENT (SECOND) OF TORTS § 496B cmt. b (1965); KEETON et al., *supra* note 7, at 482.

53. "It must appear that the terms [of the contract] were in fact brought home to [the plaintiff] and understood by him, before it can be found that he has accepted them." RESTATEMENT (SECOND) OF TORTS § 496B cmt. c (1965). This is especially true if the defendant drafts the agreement. *Id.*

54. KEETON et al., *supra* note 7, at 482.

55. *Miller v. Fallon County*, 222 Mont. 214, 220, 721 P.2d 342, 346 (1986). *But see Swarthout*, *supra* note 46, at 705 ("the general rule is that persons may not contract against the effect of their own negligence . . .").

56. *See, e.g., Kopischke*, 187 Mont. at 491, 610 P.2d at 679 (public policy requires used car dealers to inspect cars for safety before selling); *Haynes*, 163 Mont. at 279, 517 P.2d at 376 (release exculpating county from all liability related to fair proceedings deemed contrary to public policy). *See also* MONT. CODE ANN. § 1-3-204 (1991) which provides that "[A]nyone may waive the advantage of a law intended solely for his benefit but a law established for a public reason cannot be contravened by a private agreement." In Montana an illegal contract is defined as "contrary to the policy of express law, though not expressly prohibited." MONT. CODE ANN. § 28-2-701(2) (previously RCM § 13-801(2) (1947)). *See also* Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441 (Cal. 1963) (sets out test to determine if public interest invalidates exculpatory clause); RESTATEMENT (SECOND) OF CONTRACTS § 575(1)(a)-(b) (1965). In 1986 the court boldly expressed its disfavor with exculpatory agreements and extended the above holdings in *Miller*, 222 Mont. 214, 721 P.2d 342. To determine if public policy had been violated, the court examined MONT. CODE ANN. § 28-2-702 (1991) "Contracts that violate policy of the law—exemption from responsibility." The court held the statute "to mean that no person or corporation may contract to exempt himself or itself from responsibility for his, its or its employee's: . . . (2) willful injury to the property or person of another; (3) negligent or willful violation of law. *Id.* at 221, 721 P.2d at 346. The court announced that even a private exculpatory agreement entered into between private individuals was invalid as against public policy if the contract met the provisions outlined in MONT. CODE ANN. § 28-2-702 (1991). *Id.* at 221, 721 P.2d at 347. A persuasive dissent by Justice Weber followed. *Id.* at 222, 721 P.2d at 347 (Weber, J., dissenting).

57. *See* MONT. CODE ANN. § 39-2-705 (1991) (contracts which discharge an employer from negligence liability are void); MONT. CODE ANN. § 69-14-1006 (1991) (railroad employee does not assume risks incident to employment and resulting from the employer's negligence). *See also* RESTATEMENT (SECOND) OF TORTS § 496B cmt. f (1965); KEETON et al., *supra*

ing express assumption of risk in Montana should, therefore, expect the agreement's language and intent to be carefully scrutinized.⁵⁸ The court may, however, enforce an agreement that does not contravene public policy if an honest effort to apportion an advance amount of liquidated damages is made,⁶⁰ and where the provider bases the cost rates on a graduated scale.⁶¹ The agreement itself should also specifically address the exculpatory conduct "clearly and unequivocally, as by using the word 'negligence' itself."⁶² In addition, the defendant must establish that the plaintiff understood the terms of the agreement when the plaintiff consented to it.⁶³

note 7, at 482.

58. RESTATEMENT (SECOND) OF TORTS § 496B cmt. j (1965). The unequal "bargaining power may arise . . . from the exigencies of the needs of the plaintiff himself, which leave him no reasonable alternative to the acceptance of the offered terms." *Id.* See, e.g., *Brewer*, 234 Mont. at 116, 762 P.2d at 231 (holding unconstitutional a statute which provided that skiers assume all risks for injuries and property loss which result from skiing). The *Brewer* court held that "[s]uch provisions eliminate any theory of negligence on the part of the ski area operator. This law contradicts § 27-1-701, MCA, under which a person is responsible for an injury resulting from his want of ordinary care." *Id.* at 115, 762 P.2d at 230. See also K.A. Drechsler, Annotation, *Validity of Contractual Provisions by One other than Carrier or Employer for Exemptions from Liability, or Indemnification, for Consequences of Own Negligence*, 175 A.L.R. 8, 12-38 (1948), for a more thorough analysis of unequal bargaining power.

59. The Montana Supreme Court's rationale for strict scrutiny follows from the premise that there is "an express public policy [in] this state to fix responsibility for damage to person or property upon those who fail to exercise ordinary care or skill." *Kopischke*, 187 Mont. at 486, 610 P.2d at 676 (quoting *Haynes*, 163 Mont. at 280, 517 P.2d at 376) (both cases citing R.C.M. 1947, § 58-607 (1947)). See also MONT. CODE ANN. § 27-1-701 (1991):

[E]veryone is responsible not only for the results of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has willfully or by want of ordinary care brought the injury upon himself.

The policy of MONT. CODE ANN. § 27-1-701 is "[t]o fix primary responsibility and liability on the tortfeasor whose conduct occasioned the loss or injury, and . . . to make the victim whole." *Haynes*, 163 Mont. at 280, 517 P.2d at 377. The court will also scrutinize the agreement to determine if it meets the requirements of contract law (i.e., mutual assent, etc.). Note, *Assumption of Risk*, *supra* note 8, at 72-73 (citing *Jones v. Great N. Ry.*, 68 Mont. 231, 217 P. 673 (1923)).

60. RESTATEMENT (SECOND) OF TORTS § 496B cmt. h (1965); KEETON et al., *supra* note 7, at 483.

61. *Haynes*, 163 Mont. at 283, 517 P.2d at 378 (citing *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963)); RESTATEMENT (SECOND) OF TORTS § 496B cmt. i (1965); KEETON et al., *supra* note 7, at 483. See also *Morgen & Oswood Constr. Co., v. Big Sky of Montana, Inc.*, 171 Mont. 268, 273, 557 P.2d 1017, 1020 (1977) (explaining liquidated damages). These options ordinarily provide complete protection at the highest price.

62. KEETON et al., *supra* note 7, at 484.

63. *Id.* at 483-84.

b. Implied Assumption of Risk

A second set of situations that may invoke the assumption of risk doctrine arise by implicit agreement.⁶⁴ The implied form of the doctrine is not a "matter of express agreement, but has been found to be implied from the conduct of the plaintiff under the circumstances."⁶⁵ It is rooted in the concept of consent.⁶⁶ If the defendant can prove that the (1) plaintiff appreciated the risk (i.e., the plaintiff knew and understood the risk) and (2) the plaintiff's choice to incur the risk was free and voluntary,⁶⁷ the defendant's duty is stripped and recovery is barred just as though the plaintiff had expressly consented.⁶⁸ The same public policy limitations that vitiate the defense of express assumption of risk, however, also apply to implied assumption of risk.⁶⁹

Implied assumption of risk is commonly divided into three perspectives. The first form of implied assumption of risk arises when "the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances."⁷⁰ If not for the plain-

64. The Restatement describes implied assumption of risk as follows:

A plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct or by the condition of the defendant's land or chattels, and who nevertheless voluntarily chooses to enter or remain within the area of the risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.

RESTATEMENT (SECOND) OF TORTS § 496C (1965).

65. KEETON et al., *supra* note 7, at 484-85. "Implied consent is consent which exists in fact, but is manifested by conduct other than words." RESTATEMENT (SECOND) OF TORTS § 496C cmt. h (1965). A baseball fan who purchases a ticket to an unscreened seat impliedly consents that the game may proceed without anyone taking precautions to protect the fan from being hit by a ball. The fan assumes the risk of being struck, and relieves the defendant of any duty owed to the fan *unless* the fan had no knowledge of baseball or the danger of foul balls. See, e.g., RESTATEMENT (SECOND) OF TORTS § 496A cmts. c and g (4-5) (1965). In addition to conduct, a court may decide that a plaintiff assumed a risk when it finds an indicative statement or clause implicitly present in an agreement. Wade, *supra* note 6, at 8.

66. RESTATEMENT (SECOND) OF TORTS § 496C cmt. h (1965).

67. In addition to the requirements of "free" and "voluntary," assumption of risk in the strict liability context also requires the plaintiff to have *unreasonably* used a product. *Brown*, 176 Mont. at 110-11, 576 P.2d at 719 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965)); see *infra* notes 140-43 and accompanying text.

68. RESTATEMENT (SECOND) OF TORTS § 496C cmt. b (1965).

69. RESTATEMENT (SECOND) OF TORTS § 496C cmt. j (1965). See *supra* notes 56-63 and accompanying text. See, e.g., *Kalanick v. Burlington N. R.R. Co.*, 242 Mont. 45, 788 P.2d 901 (employee assumed risk of injury from unloading railroad ties).

70. RESTATEMENT (SECOND) OF TORTS § 496A cmt. b (1965). Like express assumption of risk, this first form of implied assumption of risk should also remain unchanged with the adoption of comparative principles. KEETON et al., *supra* note 7, at 481 n.10. This first form of the implied doctrine is theoretically "a principle of no duty, or no negligence, and so

tiff's implied consent, the defendant would be subject to a tort action.⁷¹ The second form of implied assumption of risk occurs when "the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it."⁷² The third form of implied assumption of risk is closely linked to contributory negligence. This form of the doctrine arises when "the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence."⁷³

2. *The Elements of Assumption of Risk*

The specific requirements of assumption of risk were first introduced in Montana in *Wollan v. Lord*,⁷⁴ an employer-employee dispute. In *Wollan*, the Montana Supreme Court outlined four essential elements the defendant must prove in any negligence case involving assumption of risk. To succeed in the suit, a defendant must demonstrate: (1) either actual or implicit knowledge of the particular situation; (2) an appreciation of the particular situation as dangerous; (3) that the plaintiff voluntarily remained in the danger or proceeded upon the danger with knowledge of the present conditions; and (4) that injury resulted as the usual and probable outcome of the dangerous condition.⁷⁵

Assumption of risk requires "knowledge, actual or implied, of the particular⁷⁶ condition creating the risk."⁷⁷ If the plaintiff testi-

denies the existence of any underlying cause of action," without which a claim cannot stand. *Id.* at 496.

71. RESTATEMENT (SECOND) OF TORTS § 496C cmt. c (1965).

72. RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965). See *Hanson*, 152 Mont. 161, 447 P.2d 486 (where business invitee slipped on ice covering a sidewalk she knew was dangerous).

73. RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965). See *Buck v. State*, 222 Mont. 423, 723 P.2d 210 (1986) (passengers knowingly accepted ride with drunk driver); *Cassady*, 131 Mont. 390, 340 P.2d 509 (where iceskater and young daughter were injured while skating on ice known to be rough and dangerous).

74. 142 Mont. 498, 503, 385 P.2d 102, 105 (1963).

75. *Id.* at 503, 385 P.2d at 105. Because these elements are difficult for the defendant to prove, the issues are normally left for jury determination. KEETON et al., *supra* note 7, at 487. See *supra* note 42 and accompanying text.

76. The term "particular" is necessary because a plaintiff may face multiple risks. The plaintiff must have appreciated the particular, isolated risk that caused the injury before a court will find that the plaintiff assumed the risk. See *Kopischke*, 187 Mont. 471, 500, 610 P.2d 668, 683-84; RESTATEMENT (SECOND) OF TORTS § 496C cmt. i (1965).

77. *Kopischke*, 187 Mont. at 500, 610 P.2d at 683 (citing *Hanson*, 152 Mont. at 164, 447 P.2d at 488) (emphasis in original). Knowledge is determined by examining whether the plaintiff subjectively realized the danger, not whether the reasonable person of ordinary prudence failed to realize it. The latter test is used to determine contributory negligence. KEETON et al., *supra* note 7, at 487. In *Brown*, the court held that jury instructions (in strict liability cases) containing the words "actual or implied" were incorrect because they injected

fies that he did not actually appreciate the danger,⁷⁸ comprehension may nonetheless be implied by the trier of fact through the introduction of circumstantial evidence if the risk was obvious.⁷⁹

The plaintiff must also appreciate the condition as dangerous, and freely and voluntarily chance upon meeting the danger.⁸⁰ The element of voluntariness is satisfied by any form of intentional manifestation⁸¹ unless the defendant should not have reasonably relied upon such consent,⁸² or there was no choice but to encounter the risk or enter into a relationship.⁸³

Finally, a defendant must demonstrate that injury resulted as the usual and probable consequence of the dangerous condition. The Montana Supreme Court has, however, ignored the phrase

objective elements into a determination of assumption of risk. 176 Mont. at 114, 576 P.2d at 721. Instructions geared more toward subjective knowledge were proper. *Id.* Justice Shea argued that this rule should not be limited to strict liability cases but should extend to all assumption of risk cases. *Id.* at 121, 576 P.2d at 724 (Shea, J., concurring).

78. See *Shahrokhfar*, 194 Mont. at 82, 634 P.2d at 657.

79. *Brown*, 176 Mont. at 112, 576 P.2d at 720; *Hanson*, 152 Mont. at 166, 447 P.2d at 489. RESTATEMENT (SECOND) OF TORTS § 496D cmt. d (1965); KEETON et al., *supra* note 7, at 488. This indirectly injects an objective element into the test. *Id.* See also *supra* note 77. Originally, the knowledge requirement was satisfied when circumstantial evidence left no other inference but that the plaintiff knowingly and voluntarily encountered the danger. The plaintiff assumed the risk as a matter of law. *Thomas v. Quartermaine*, 17 L. Rep. 414, 417 (Q.B. Div. 1886). Knowledge, however, does not imply voluntariness if there is no possibility of choice available. *Thrussell v. Handyside*, 20 L. Rep. 359, 364 (Q.B. Div. 1888). In *Brown*, the court held that:

[i]f by reason of age, or lack of information, experience, intelligence, or judgment, the plaintiff does not understand the risk involved in a known situation, he will not be taken to assume the risk, although it may be found that his conduct is contributory negligence because it does not conform to the community standard of the reasonable man.

176 Mont. at 111-12, 576 P.2d at 719 (citing *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 765-66 (E.D. Pa. 1971)).

80. KEETON et al., *supra* note 7, at 489. ("Thus a guest who accepts a gratuitous ride in an automobile has been taken to [impliedly] assume the risk of defects in the car unknown to the driver.") *Id.*

81. "In negligence it involves only his agreement to being subjected to a danger of possible invasion." Wade, *supra* note 6, at 7. The voluntary consent element is normally satisfied even when the plaintiff hesitated or was reluctant before clearly accepting the risk. RESTATEMENT (SECOND) OF TORTS § 496E cmt. a (1965).

82. KEETON et al., *supra* note 7, at 490. For example, someone running across a target range is not consenting to be shot. His conduct would be more akin to contributory negligence because he is *unreasonably* incurring a risk in assuming that those shooting will avoid him. In addition, reliance is unreasonable when assent was given so long ago, and without response, that any subsequent action cannot be linked to the earlier acceptance of risk. RESTATEMENT (SECOND) OF TORTS § 496E cmt. a (1965). Reliance is not unreasonable when the plaintiff is forced to consent to risks created by circumstances independent of the defendant's tortious conduct. RESTATEMENT (SECOND) OF TORTS § 496E cmt. b (1965).

83. Here, consent is not free and voluntary because assent is procured through duress or other tortious conduct by the defendant. RESTATEMENT (SECOND) OF TORTS § 496E cmt. c (1965). See also Warren, *supra* note 4, at 471.

"usual and probable." A literal interpretation of the clause would inject unreasonableness into the equation; it would "require the plaintiff to be negligent in assuming a risk [which] would . . . confuse the two distinct [doctrines] of assumption of risk and contributory negligence."⁸⁴

Because assumption of risk is so complex, the doctrine's definition has required continual refinement to fit within changes in the legal system's structure. When the Montana Legislature adopted the doctrine of comparative negligence in 1975, the supreme court was again required to evaluate the assumption of risk doctrine. The Montana Supreme Court chose to redefine and harmonize the two defenses so they could co-exist within Montana's legal system.

III. THE MONTANA SUPREME COURT INJECTS COMPARATIVE PRINCIPLES INTO THE DOCTRINE OF ASSUMPTION OF RISK

A. *Comparative Negligence is Adopted in 1975*

The Montana Legislature adopted comparative negligence in 1975 to eliminate the complete bar to recovery that contributory negligence presented.⁸⁵ The current statute requires that "any damages allowed [by contributory negligence] shall be diminished in the proportion to the amount of negligence attributable to the person recovering."⁸⁶ Comparative negligence is applicable in Montana when the plaintiff's negligence is "not greater than" the defendant's negligence.⁸⁷ The policy behind comparative negligence "is to allow a plaintiff, who may have been negligent, to recover from a negligent defendant the amount of damages caused by the defendant's conduct, in spite of plaintiff's negligence."⁸⁸

Although the Montana Legislature clearly applied comparative principles to contributory negligence, the relationship between comparative negligence and implied assumption of risk was left unclear. The Montana Supreme Court was forced to address the issue because contributory negligence and assumption of risk often

84. Note, Assumption of Risk, *supra* note 8, at 78.

85. R.C.M. 1947, § 58-607.1 (Supp. 1977).

86. MONT. CODE ANN. § 27-1-702 (1991).

87. MONT. CODE ANN. § 27-1-702 (1991). A plaintiff will succeed in a suit if the plaintiff is 50% liable. The damages awarded to the plaintiff, however, will be reduced by the percentage of liability attributed to the plaintiff. For example, if the award is \$100,000 and the plaintiff is 50% responsible, then the plaintiff will receive a \$50,000 judgment. On the other hand, the plaintiff recovers nothing if the plaintiff is 51% (or more) liable.

88. Comment, Comparative Negligence, *supra* note 9, at 152.

overlap.⁸⁹ The court once again set out to interpret and clarify the status of assumption of risk in Montana.

B. The Montana Supreme Court Foreshadows Reconciliation of Comparative Negligence and Assumption of Risk

*Kopischke v. First Continental Corp.*⁹⁰ involved a customer suit brought against an auto dealer for negligently selling an unsafe automobile.⁹¹ At the time of sale, neither the dealer nor the plaintiff were aware that the car's odometer had been turned back, or that the vehicle was extensively damaged internally.⁹² After the sale, the plaintiff took the car to her mechanic for an inspection.⁹³ The mechanic warned the plaintiff that the car was in need of repairs and was not safe to drive.⁹⁴ The plaintiff responded by notifying one of the defendant's salesmen about the vehicle's recurring problems.⁹⁵ The salesman assured her "that the car was merely 'dieseling' and that premium gas would correct the problem."⁹⁶ The plaintiff continued to drive the vehicle until it eventually went out of control, rolled, and ejected her.⁹⁷ The accident left the plaintiff paraplegic.⁹⁸

The defendant car dealer asserted the defense of express and implied assumption of risk in the lower court.⁹⁹ The trial court refused to turn either assumption of risk issue over to the jury and, on appeal, the Montana Supreme Court affirmed.¹⁰⁰

The supreme court held that the express "as is" provision in the purchase agreement was an exculpatory clause that violated public policy.¹⁰¹ According to the court, "It cannot be denied that

89. The two defenses may overlap when the plaintiff's conduct in assuming a risk is *unreasonable*. RESTATEMENT (SECOND) OF TORTS § 466 cmt. c (1965). A defendant can raise either or both defenses in this situation. *D'Hoodge v. McCann*, 151 Mont. 353, 362-63, 443 P.2d 747, 751-52 (1968); *Cassady v. City of Billings*, 135 Mont. 390, 392, 340 P.2d 509, 510 (1959). Many scholars favor abolishing assumption of risk and replacing it with contributory negligence when the two overlap. See Fleming, *supra* note 7, at 186-88.

90. 187 Mont. 471, 610 P.2d 668 (1980).

91. *Id.* at 473, 610 P.2d at 669.

92. *Id.* at 474-75, 610 P.2d at 670.

93. *Id.* at 475, 610 P.2d at 670.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 475-76, 610 P.2d at 670.

98. *Id.* at 476, 610 P.2d at 670.

99. *Id.* at 479, 610 P.2d at 672.

100. *Id.* at 500, 610 P.2d at 683. Where the existence of assumption of risk raises no question of fact, the issue is not turned over to the jury. See *supra* note 42 and accompanying text.

101. *Kopischke*, 187 Mont. at 491, 610 P.2d at 679.

inspecting used cars to insure their safe operation is an act in the public interest."¹⁰² The supreme court also affirmed the lower court's decision to strike the implied assumption of risk defense because the plaintiff had neither actual nor implied knowledge of the particular condition that created the risk.¹⁰³ The first prong of the *Wollan* test was therefore not satisfied.¹⁰⁴

The adoption of comparative negligence had left the status of assumption of risk unclear for some time. Although assumption of risk was not applicable in *Kopischke*, the court nevertheless went on to interpret its status. In dicta, the court set forth recent holdings from other jurisdictions and indicated that, when the issue of assumption of risk did properly arise, the court would follow "the modern trend."¹⁰⁵ The court stated that it would "treat [implied] assumption of the risk like any other form of contributory negligence and apportion it under the comparative negligence statute."¹⁰⁶ In effect, the court advocated transforming the assumption of risk doctrine from an absolute defense that prohibited the plaintiff's action, to a doctrine that merely defended against an existing suit.¹⁰⁷

C. Assumption of Risk in Negligence Cases

*Abernathy v. Eline Oil Field Services, Inc.*¹⁰⁸ was the first case to provide the Montana Supreme Court an opportunity to directly address the validity of assumption of risk after the enactment of the comparative negligence statute. *Abernathy* involved a collision between the plaintiff's car, which had struck a snowbank, and an on-coming truck driven by the defendant's agent.¹⁰⁹ The plaintiff was severely injured in the accident, and his son was killed.¹¹⁰

At trial, the jury was presented instructions aimed at proving both contributory negligence and assumption of risk.¹¹¹ These instructions were apparently given in response to the *Kopischke* dicta, which stated that the supreme court would treat conduct that resembled implied assumption of risk as contributory negli-

102. *Id.*

103. *Id.* at 501, 610 P.2d at 684.

104. See *supra* notes 75-79 and accompanying text.

105. *Kopischke*, 187 Mont. at 507, 610 P.2d at 687.

106. *Id.*

107. See Warren, *supra* note 4, at 458.

108. 200 Mont. 205, 650 P.2d 772 (1982).

109. *Id.* at 207, 650 P.2d at 774.

110. *Id.*

111. *Id.* at 210, 650 P.2d at 775.

gence and allow the jury to apportion damages comparatively.¹¹² One issue raised on appeal was whether "the trial court err[ed] in instructing the jury on the elements of assumption of risk" ¹¹³

The Montana Supreme Court held that the instruction was erroneous,¹¹⁴ and refused to harmonize contributory negligence and assumption of risk. It found the two defenses incompatible because assumption of risk is governed by a subjective standard and contributory negligence is measured under the reasonable person standard.¹¹⁵ The court concluded that implied assumption of risk would no longer be valid in Montana because the defense would "only serve to confuse a jury."¹¹⁶ It directed that, in any negligence action similar to *Abernathy*, jury instructions must be formulated under the reasonable person standard, rather than the subjective standard so closely aligned with assumption of risk.¹¹⁷ In effect, the court adopted the doctrine of comparative fault.¹¹⁸ It "merged the defense of assumption of risk in negligence cases into the general scheme of comparative negligence, following the reasoning that assumption of risk is a variant of contributory negligence."¹¹⁹ The court, however, deferred a decision on the applicability of the assumption of risk defense to products liability cases.¹²⁰

Just two years later, in *Thibaudeau v. Uglum*,¹²¹ the court seemingly disregarded its holding in *Abernathy*. *Thibaudeau* involved a traffic accident between two motorists who entered an intersection at the same time. The plaintiff claimed he had the right-of-way.¹²² The defendant raised the defenses of implied assumption of risk and contributory negligence.¹²³ Although implied assumption of risk appeared to have been abolished in *Abernathy*, the supreme court made no mention of the error and dismissed the case on other grounds.¹²⁴

112. *Id.* at 208, 650 P.2d at 774.

113. *Id.* at 207, 650 P.2d at 773.

114. *Id.* at 211, 650 P.2d at 775.

115. *Id.*

116. *Id.* at 210, 650 P.2d at 775.

117. *Id.* at 211, 650 P.2d at 776.

118. The court used the term "comparative fault" instead of "comparative negligence" because assumption of risk is different than negligence and the comparative negligence statute applied only to actions based in negligence.

119. *Zahrte v. Sturm, Ruger & Co.*, 203 Mont. 90, 95, 661 P.2d 17, 19 (1983) (Gulbrandson, J., dissenting).

120. *Abernathy*, 200 Mont. at 211, 650 P.2d at 776.

121. 201 Mont. 260, 653 P.2d 855 (1982).

122. *Id.* at 262, 653 P.2d at 856.

123. *Id.*

124. The case was reversed and remanded because the court found sufficient evidence to preclude a directed verdict. *Id.* at 267, 653 P.2d at 859.

*Wilhelm v. City of Great Falls*¹²⁵ also involved the assumption of risk defense. In *Wilhelm*, a family moved into a house knowing it was located one mile from a dump.¹²⁶ Four years later, the dump began emitting an unusual amount of smoke. When stench and particles from the dump filled the air surrounding the Wilhelms' property,¹²⁷ they instituted an action against the city. The jury found the homeowners ninety percent negligent, and the city ten percent negligent.¹²⁸ The trial judge granted the Wilhelms' motion for a new trial and the Montana Supreme Court affirmed.¹²⁹

Assumption of risk jury instructions were disallowed at the trial pursuant to the supreme court's holding in *Abernathy*.¹³⁰ The defendant was, however, permitted to argue assumption of risk as it related to "respondents' portion of the negligence that caused the damages."¹³¹ On appeal, the Montana Supreme Court failed to address the fact that it had unequivocally abandoned implied assumption of risk in *Abernathy*.¹³² Instead of clarifying the confusion, the court held that it would "not consider the theory of assumption of risk" because it had not been raised on appeal.¹³³

The Montana Supreme Court has been unclear in setting forth the standards for applying the doctrine of assumption of risk. Montana practitioners have responded with confusion and misinterpreted the court's intentions in response. Instead of clarifying these misapplications, however, the supreme court has avoided the issue. Unfortunately, this confusion did not end with actions in negligence, but carried over to assumption of risk in products liability cases dealing with strict liability and abnormally dangerous activities as well.

D. Assumption of Risk in Strict Liability Cases

1. Products Liability

In *Abernathy*, the Montana Supreme Court refused to address whether assumption of risk would completely bar a strict liability

125. 211 Mont. 430, 685 P.2d 350 (1984).

126. *Id.* at 431, 685 P.2d at 350-51.

127. *Id.* at 432, 685 P.2d at 351.

128. *Id.* at 431, 685 P.2d at 350.

129. *Id.*

130. *Id.* at 432, 685 P.2d at 351. See *supra* notes 113-17 and accompanying text.

131. *Wilhelm*, 211 Mont. at 432, 685 P.2d at 351.

132. See *supra* notes 112-16 and accompanying text. See also *Samuelson v. A.A. Quality Constr.*, 230 Mont. 220, 749 P.2d 73 (1988) (where assumption of risk was pleaded but dismissed on procedural grounds).

133. *Wilhelm*, 211 Mont. at 434, 685 P.2d at 352.

ity¹³⁴ recovery.¹³⁵ The court finally addressed the issue in *Zahrte v. Sturm, Ruger & Co.*¹³⁶ The court held that assumption of risk would remain a valid defense in strict liability cases,¹³⁷ but that it would not remain an absolute bar to recovery.¹³⁸ Instead, assumption of risk would be compared in the same manner as contributory negligence is compared under the comparative negligence statute.¹³⁹ The court held that this comparison was possible because assumption of risk is measured differently in strict liability actions than in negligence actions.¹⁴⁰ In a strict liability action, assumption of risk is satisfied when the plaintiff has "a subjective knowledge of the danger and then voluntarily¹⁴¹ and unreasonably" comes in contact with an apparent¹⁴² danger.¹⁴³ The court's decision to preserve assumption of risk and harmonize it with comparative negligence did cause somewhat of a problem because it required that the court differentiate between contributory negligence and as-

134. The seller in a strict liability action is subject to liability even when the seller exercises the utmost care in constructing and selling a product to a purchaser. RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1965). It is not, however, "complete liability without fault." *Kuiper v. Goodyear Tire & Rubber Co.*, 207 Mont. 37, 59, 673 P.2d 1208, 1220 (1983).

135. 200 Mont. at 211, 650 P.2d at 776.

136. 203 Mont. 90, 661 P.2d 17 (1983). *Zahrte v. Sturm, Ruger & Co.*, 498 F. Supp. 389 (D.C. Mont. 1980) was appealed from Montana's federal district court to the Ninth Circuit Court of Appeals. The Ninth Circuit then ordered petitioner to submit to the Montana Supreme Court the questions that make up this case. *Id.*

137. In fact, it was the *only* remaining defense in strict liability. *Zahrte*, 203 Mont. at 93, 661 P.2d at 18.

138. *Id.* This meant that a successfully asserted assumption of risk defense would no longer bar a plaintiff's recovery if the plaintiff's liability was "not greater than" the defendant's liability. See MONT. CODE ANN. § 27-1-702 (1991).

139. *Zahrte*, 203 Mont. at 94, 661 P.2d at 19. Because the comparative negligence statute applies only "in an action . . . for negligence," comparative *negligence* is incompatible with the concept of strict liability. MONT. CODE ANN. § 27-1-702 (1991). See *Zahrte*, 498 F. Supp. 389. The term comparative *fault* has been adopted in other jurisdictions to circumvent this problem. See, e.g., *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978). For some reason, the court in *Zahrte* never explicitly mentions that it is adopting this new concept of comparative fault in strict liability.

140. *Zahrte*, 203 Mont. at 93, 661 P.2d at 18.

141. Carl W. Tobias and William A. Rossbach, *A Framework for Analysis of Products Liability in Montana*, 38 MONT. L. REV. 221, 281 (1977) [hereinafter *Tobias and Rossbach*]. Time constraints, unavailability of alternative products, and threat of losing one's job may relieve a plaintiff of assuming a risk in a strict liability action. *Id.*

142. "The plaintiff must know the facts that create the danger and must comprehend the danger." *Id.* at 280.

143. *Zahrte*, 203 Mont. at 94, 661 P.2d at 18-19. The Montana Supreme Court has adopted the Restatement's definition of assumption of risk in strict liability. The Restatement sets out that "[I]f the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery." *Brown v. North Am. Mfg. Co.*, 176 Mont. 98, 122, 576 P.2d 711, 725 (1978) (emphasis omitted) (Shea, J., concurring) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965)).

sumption of risk.¹⁴⁴

Referring back to the *Kopischke* dicta, the court reasoned that the concepts of implied assumption of risk and contributory negligence were actually quite distinct.¹⁴⁵ The court stated, "The thrust of *Kopischke* is to allow assumption of risk to be compared rather than have it operate as an absolute bar. We did not intend in *Kopischke* to merge the two defenses."¹⁴⁶

The court also referred to *Brown v. North American Manufacturing Co.*,¹⁴⁷ a case which applied assumption of risk to a products liability suit prior to the adoption of comparative negligence. *Brown* involved a farmer who lost his left leg in a self-unloading feed wagon auger.¹⁴⁸ The farmer brought a strict liability action against the maker of the feed wagon for manufacturing a faulty excess grain door.¹⁴⁹ The defendant claimed that the plaintiff assumed the risk because the danger was "open and obvious."¹⁵⁰ The trial court found for the plaintiff. The supreme court affirmed, holding that the defendant had not met its burden of proving that the plaintiff had subjective knowledge of the hidden danger.¹⁵¹ *Brown* is significant because it was decided prior to the adoption of comparative negligence and categorized assumption of risk as a complete bar to recovery. To legitimize its new *Zahrte* ruling in light of *Brown*, the court implied that *Zahrte* was distinguishable from *Brown* (and thus liability should be compared) because *Zahrte* arose after the advent of comparative negligence (even though comparative fault would apply).

Justice Gulbrandson strongly dissented from the *Zahrte* opinion. He postulated that, by invoking the voluntary and unreasonable standard, "comparative principles will not be applied where the plaintiff voluntarily and *reasonably* exposes himself to a known danger or where the plaintiff has engaged in negligent conduct."¹⁵²

144. *Zahrte*, 203 Mont. at 93, 661 P.2d at 18. Contributory negligence is not a defense in a strict liability action. *Id.* Strict liability is not rooted in negligence; a defendant may be strictly liable even without being negligent. Thus, the court was forced to differentiate between assumption of risk and contributory negligence in order to permit assumption of risk to be used as a defense in products liability actions.

145. *Id.* Assumption of risk applies a subjective measurement to conduct, while contributory negligence requires an objective application. *Id.*

146. *Id.*

147. 176 Mont. 98, 576 P.2d 711.

148. *Id.* at 101, 576 P.2d at 714.

149. *Id.* at 101-03, 576 P.2d at 714-15.

150. *Id.* at 104-05, 576 P.2d at 716.

151. *Id.* at 112-13, 576 P.2d at 720.

152. *Zahrte*, 203 Mont. at 96, 661 P.2d at 20 (Gulbrandson, J., dissenting). For an extensive discussion of this issue, see Fleming, *supra* note 7.

*Kuiper v. Goodyear Tire & Rubber Co.*¹⁵³ and *Krueger v. General Motors Corp.*¹⁵⁴ were the only products liability cases after *Zahrte* to reach the supreme court. Both cases affirmed *Zahrte*, holding that once the plaintiff is found to have assumed the risk, the plaintiff's conduct must be compared with the defendant's actions.¹⁵⁵

2. Abnormally Dangerous Activities

The Montana Supreme Court has also considered the application of the assumption of risk doctrine to strict liability actions relating to abnormally dangerous activities¹⁵⁶ since the adoption of comparative negligence. The only case addressing the issue is *Matkovic v. Shell Oil Co.*¹⁵⁷ In *Matkovic*, the defendant hired a trucking company to haul its contaminated water to a disposal area.¹⁵⁸ The truck broke down during delivery and was taken to a garage for repairs.¹⁵⁹ The shop attendant assigned to work on the truck was exposed to residue left in the truck.¹⁶⁰ The attendant died from fume inhalation shortly thereafter.¹⁶¹

The court held that, because it had applied comparative principles to assumption of risk in products liability, it would do the same in an abnormally dangerous activity suit.¹⁶² Just as in *Zahrte*, the assumption of risk defense would not operate as an absolute bar to recovery.¹⁶³ The *Matkovic* court also followed *Zahrte* in another manner. It refused to recognize contributory negligence as a defense to an abnormally dangerous products action.¹⁶⁴ In effect,

153. 207 Mont. 37, 673 P.2d 1208.

154. 240 Mont. 266, 783 P.2d 1340 (1989).

155. *Kuiper*, 207 Mont. at 64, 673 P.2d at 1222; *Krueger*, 240 Mont. at 276, 783 P.2d at 1347.

156. RESTATEMENT (SECOND) OF TORTS § 519 (1976) states that:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

157. 218 Mont. 156, 707 P.2d 2 (1985). This case was certified to the Montana Supreme Court by the Federal District Court in Montana. *Id.* at 157, 707 P.2d at 3.

158. *Id.* at 158, 707 P.2d at 3.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 160, 707 P.2d at 4.

163. *Id.* "If it is determined that plaintiff's conduct is more responsible than defendant, then plaintiff cannot recover. If plaintiff's conduct is found to be equal to or less than defendant's conduct, then plaintiff's recovery must be reduced by the percentage attributable to plaintiff." *Id.*

164. *Id.* at 161, 707 P.2d at 5.

assumption of risk remained the sole defense in suits based on both products liability and abnormally dangerous activity actions where strict liability was asserted.

IV. CRITICISMS OF THE MANNER IN WHICH THE MONTANA SUPREME COURT HAS INTERPRETED AND APPLIED THE ASSUMPTION OF RISK DOCTRINE

The Montana Supreme Court has inconsistently defined and applied the doctrine of assumption of risk. The earliest assumption of risk cases reflect the court's confusion in interpreting the doctrine's elements. When the court finally settled on a definition, it failed to consistently apply that definition. More recently, the Montana Supreme Court has muddled the application of the defense with the adoption of comparative fault principles.

Assumption of risk was, from the start, erratically defined by the court. The defense was initially evaluated under the objective standard, but was later altered to conform to the subjective standard in *Cassady*.¹⁶⁵ After *Cassady*, however, the court continued to cite cases that held that assumption of risk was governed under the objective standard.¹⁶⁶ In fact, the court admitted its lack of uniformity in *Brown*, stating: "In the past Montana cases have not been consistent in distinguishing between the subjective standard required in the defense of assumption of risk, and the objective standard necessary to a contributory negligence defense."¹⁶⁷

After years of controversy, the court seemed to have settled the doctrine's elementary dispute.¹⁶⁸ The next step was to apply the principles to case law. The court first attempted to define the doctrine's applicability to relationships. Assumption of risk was initially limited to the master-servant relationship or related contractual sphere.¹⁶⁹ In 1959, the court extended the defense to relationships outside the employment setting in *Cassady*,¹⁷⁰ then narrowed it again in *Shahrokhfar*¹⁷¹ in 1981. In *Shahrokhfar*, the

165. 135 Mont. 390, 392, 340 P.2d 509, 510 (1959).

166. See, e.g., *Wollan v. Lord*, 142 Mont. 498, 385 P.2d 102 (1963), where the court states that "the law is clear that in Montana . . . risks are assumed also, if the servant knows of them or they are so obvious he should have known of them." *Id.* at 503, 385 P.2d at 105 (emphasis added) (citing *Leonidas v. Great N. Ry. Co.*, 105 Mont. 302, 72 P.2d 1007 (1937)); *Grant v. Nihill*, 64 Mont. 420, 210 P. 914 (1922); *Matson v. Hines*, 63 Mont. 214, 207 P. 474 (1922)).

167. *Brown v. North Am. Mfg. Co.*, 176 Mont. 98, 111, 576 P.2d 711, 719 (1978).

168. *Wollan*, 142 Mont. at 503, 385 P.2d at 102. See *supra* note 75.

169. See *supra* note 31.

170. *Cassady*, 135 Mont. at 392, 340 P.2d at 510.

171. 194 Mont. 76, 634 P.2d 653 (1981).

court held that the application of assumption of risk outside the employer-employee relationship must be narrowly confined.¹⁷² Since then, however, the court has made no mention or use of its *Shahrokhfar* holding.

The Montana Supreme Court has also inconsistently applied assumption of risk to differing causes of action. In *Zahrte*, the court failed to address assumption of risk issues with established precedent from *Brown*. Instead, it presumptively chose to create new, post-comparative-negligence law when the issue was not properly before the court.¹⁷³ The court also failed to follow prior case law in *Zahrte*. Instead of adhering to its intentions as forecasted in *Kopischke*, the court announced that it "did not intend . . . to merge the two defenses [of assumption of risk and contributory negligence]."¹⁷⁴ That is exactly what the court originally intended; the court's intent was explicitly spelled out in *Kopischke*¹⁷⁵ and supported by citations to other jurisdictions.¹⁷⁶

A final criticism of the Montana Supreme Court relates to the

172. *Id.* at 82, 634 P.2d at 657.

173. *Zahrte v. Sturm, Ruger & Co.*, 203 Mont. 90, 94, 661 P.2d 17, 19 (1983) (Gulbrandson, J., dissenting).

174. *Id.* at 93, 661 P.2d at 18.

175. "[W]hen the situation does arise, we will follow the modern trend and treat assumption of risk like any other form of contributory negligence and apportion it under the comparative negligence statute." *Kopischke v. First Continental Corp.*, 187 Mont. 471, 507, 610 P.2d 668, 687 (1980).

176. See, e.g., *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226 (Cal. 1975); *Springrose v. Willmore*, 192 N.W.2d 826 (Minn. 1971); *Lyons v. Redding Constr. Co.*, 515 P.2d 821 (Wash. 1973). These cases were cited with approval in *Kopischke* and obviously influenced the court's decision when it predicted the status of assumption of risk. *Kopischke*, 187 Mont. at 501-06, 610 P.2d at 685-87. This case law, however, did not support the Montana Supreme Court's forecast. For example, the court relies most heavily on an excerpt from *Li*:

A statement of the California court in the *Li* case is representative of the reasoning which pervades all of the [preceding support]: 'We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of the risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.'

Kopischke, 187 Mont. at 506, 610 P.2d at 687 (emphasis added) (citing *Li*, 532 P.2d at 1241). The *Li* court went on to note additional situations that may bring about assumption of risk. *Li*, 532 P.2d at 1240. See *supra* notes 45-72 and accompanying text for an outline of these different forms. In addition, the *Li* court continually emphasizes that assumption of risk is abolished "to the extent that it is merely a variant of the former doctrine of contributory negligence." *Li*, 532 P.2d at 1243. The Montana Supreme Court, relying on the *Li* holding, announced in *Kopischke* that Montana "will follow the modern trend and treat assumption of the risk like any other form of contributory negligence and apportion it under the comparative negligence statute." *Kopischke*, 187 Mont. at 506, 610 P.2d at 687. The Montana Supreme Court mistakenly concludes that contributory negligence should completely replace assumption of risk. The *Li* court, however, replaces assumption of risk only when the two doctrines overlap (i.e., when the plaintiff's conduct is both voluntary and unreasonable). See *supra* note 73 and accompanying text.

treatment of implied assumption of risk as "comparative fault." This doctrine is a newly-adopted remedy in products liability cases where the court attempts to compare the defendant's product with the plaintiff's fault.¹⁷⁷ Injecting comparative principles into the concept of strict liability destroys the meaning of the term "strict." A plaintiff's strict liability claim is essentially relegated to the status of negligence or warranty. In turn, a defendant's motive to counter a strict liability claim with comparative fault principles is enhanced.

V. RECOMMENDATIONS FOR THE FUTURE INTERPRETATION AND APPLICATION OF THE ASSUMPTION OF RISK DEFENSE

The Montana Supreme Court could eliminate trouble in assimilating its defenses by discarding the new "comparative fault" doctrine. Comparative fault simply adds more confusion to Montana's legal system. Warranty and negligence claims are better suited to fit within the comparative negligence statute. The doctrine of strict liability should not be altered. For equity reasons, a plaintiff must be left with the option of claiming strict liability (i.e., claiming that a defendant is strictly liable even in the absence of negligence).¹⁷⁸

Assumption of risk should not be unequivocally merged with contributory negligence and compared under the comparative negligence statute. Assumption of risk is incompatible with contributory negligence because the defenses are too dissimilar. The focus in creating assumption of risk was to prohibit a right of action, not merely to defend that action. Furthermore, the requirements of assumption of risk do not always mesh with the requirements of contributory negligence. Assumption of risk requires a voluntary undertaking with subjective knowledge of the danger ahead. Contributory negligence, however, is satisfied with a showing of involuntary, objective elements.¹⁷⁹ The reason assumption of risk and contributory negligence are not *both* valid defenses in strict liability and abnormally dangerous products actions is precisely because the two are so different.¹⁸⁰ In only one instance do implied

177. *Zahrte*, 203 Mont. at 94, 661 P.2d at 19.

178. See *Zahrte v. Sturm, Ruger & Co.*, 498 F. Supp. 389 (1980); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843 (N.H. 1978).

179. Negligence does not consist of "a condition of mind which is capable either of designing an injury to another or agreeing that an injury should be received from another." Warren, *supra* note 4, at 460. This would amount to intentional conduct. Therefore, the voluntary nature of assumption of risk and the involuntariness or absence of will that is characteristic of contributory negligence are actually quite distinct.

180. Contributory negligence and comparative negligence only apply to actions invol-

assumption of risk and contributory negligence overlap—when a plaintiff voluntarily and unreasonably consents to encounter a danger. One state that abolished assumption of risk mistakenly held that implied assumption of risk must, “under all circumstances,” be unreasonable.¹⁸¹ Another state that has abolished assumption of risk notes that comparative principles “inevitably incorporat[e] the degree to which the plaintiff assumed the risk.”¹⁸² California followed this same line of reasoning in *Li* when it held that situations other than where the plaintiff voluntarily and unreasonably assumed the risk should merely be treated as a “reduction of defendant’s duty of care.”¹⁸³ Montana should adopt this latter exception.¹⁸⁴

If the Montana Legislature intended to inject comparative principles into the assumption of risk doctrine, it would have specified this intention. The Montana Supreme Court was legislating when it modified the historic meaning of assumption of risk and integrated comparative principles into the doctrine. If the legislature intended to add comparative principles to the meaning of assumption of risk, the legislature would have created a separate statute. If this was the legislature’s intent, it should fashion the necessary statute. Such a statute would appease the Montana Supreme Court and assist the confused Montana practitioner. This new statute could extend “the conceptualization of comparative negligence to include [implied] assumption of risk, instead of enlarging the concept of contributory negligence to include [implied] assumption of risk.”¹⁸⁵

If assumption of risk does apply to strict liability actions, it should be extremely limited to discourage production of openly hazardous products.¹⁸⁶ As the law currently stands, a defendant may be held liable where the plaintiff reasonably comes in contact with the defendant’s dangerous product. A defendant can avoid some or all liability if the plaintiff unreasonably proceeds to encounter the dangerous product. In this sense, the law promotes unreasonably dangerous products as long as they are openly

ing negligence. Neither strict liability nor abnormally dangerous activity suits are grounded in negligence.

181. *Springrose*, 192 N.W.2d at 827.

182. *Lyons*, 515 P.2d at 826.

183. *Li*, 532 P.2d at 1240.

184. In *Kopischke*, the court cited *Li* and seemed to agree with its holding. 187 Mont. at 506, 610 P.2d at 687. In *Abernathy*, however, the court unequivocally abolished assumption of risk. 200 Mont. 205, 210, 650 P.2d 774, 775 (1982).

185. Comment, Torts, *supra* note 44, at 430-31.

186. See Tobias and Roszbach, *supra* note 141, at 282.

dangerous.

The above changes would bring consistency to Montana's assumption of risk case law. Change would mitigate the stress placed on many practitioners who find it difficult to research the confusing and complex trail of assumption of risk precedents. Further, if the Montana Supreme Court overturns precedent with each convincing argument, a reliable doctrine will never emerge. Consistent decisions will allow practitioners to accurately predict the status of assumption of risk in Montana.

